STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 97B067

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE ON REMAND FROM THE STATE PERSONNEL BOARD

EDWARD J. GRZECHOWIAK,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
COLORADO TERRITORIAL CORRECTIONAL FACILITY,

Respondent.

INTRODUCTION

On June 30, 1997, the Initial Decision in this matter was issued rescinding the disciplinary action on grounds that the discipline was not imposed by a properly delegated appointing authority. On January 30, 1998, the State Personnel Board remanded the case for the introduction of additional evidence. The Board ordered:

> In view of the fact the initial decision rests on the issue of proper delegation of appointing authority, the Board finds it has an insufficient evidentiary record upon which to review the initial decision.
>
> This matter is remanded to the administrative law judge in order to allow Complainant to introduce additional *evidence* to rebut any presumption of administrative regularity, with regard to the issue of the delegation of appointing authority by the Respondent, and to allow Respondent to rebut such evidence. In addition, the issues as listed in the administrative law judge's initial decision are to be considered in light of any newly introduced evidence regarding the delegation of appointing authority.

The hearing on remand was held on April 7, 1998. Respondent was represented by Assistant Attorney General Diane Marie Michaud. Complainant appeared and was represented by James R. Gilsdorf, Attorney at Law.

Complainant called one witness: Mary West, Regional Director, Department of Corrections (DOC). Respondent did not offer evidence in rebuttal. Jerry Gasko was present but was not called to testify by either party. The previously entered witness sequestration order was continued.

No new exhibits were introduced. Both parties made reference to record exhibits 2, 3 and 4. The parties agreed to the administrative law judge reading the appellate briefs, and the briefs were incorporated into the respective closing arguments.

FINDINGS OF FACT

1. Mary West, who entered DOC employment on January 23, 1995, first became a regional director on August 1, 1996, when she was assigned to oversee the administration of the prisons in Canon City, inclusive of the Colorado Territorial Correctional Facility (CTCF). She was delegated appointing authority by Jerry Gasko via Gasko's letter dated July 12, 1996 (Exhibit 4), which she received on or about the same day.

2. West felt bound by the terms of Gasko's letter. That letter was the source of her appointing authority.

3. During the first week of August, West was briefed by Mark McKenna about the Grzechowiak matter. She told McKenna that there

was no reason to believe that he would not be delegated the appointing authority to handle the matter. She talked to Gasko about delegating the authority to McKenna, and he agreed with her that McKenna was the appropriate choice.

4. West did not ask McKenna to write a letter requesting the delegation of appointing authority.

5. On August 16, 1996, CTCF Superintendent Mark McKinna wrote a memo to West requesting the delegation of appointing authority to hold an 8-3-3 meeting with Ed Grzechowiak. (Exhibit 2.) West made the delegation on the same day, without consulting further with Gasko. (Exhibit 3.)

6. West's memo to McKenna does not reflect that a copy was provided to Gasko.

7. It is normal practice to indicate on the face of a document the name of anyone who is provided a copy of the document.

8. West does not dispute that, pursuant to Gasko's letter of delegation, she was supposed to provide Gasko a copy of any further delegation.

9. West believed that McKenna's decision in the disciplinary matter, whatever it might be, was not subject to ratification by either she or Gasko.

10. It is West's standard practice to send a copy to the deputy director whenever she further delegates appointing authority after receiving approval for the delegation.

11. West has no personal knowledge of Gasko being given a copy of her memo to McKenna. She assumes that the administrative assistant sent Gasko a copy because the assistant had worked for two years under the supervision of the previous regional director.

DISCUSSION

I.

A presumption is a legal device which operates in the absence of other proof to shift the evidentiary burden of producing evidence (the burden of going forward) to the party against whom the presumption is directed. *Black's Law Dictionary* (6th ed.) at 1185-86. The burden of producing evidence exposes a party to an adverse result when evidence on the issue has not been presented.

There are no universal rules with respect to the amount of evidence necessary to overcome a rebuttable presumption. *The Denver Publishing Co. v. The City of Aurora, Colorado*, 896 P.2d 306 (Colo. 1995). The strength or weakness of a rebuttable presumption must be determined on a case-by-case basis. *Schenck v. Minolta Office Systems, Inc.*, 802 P.2d 1131 (Colo. App. 1990); *Union Insurance Company v. RCA Corp.*, 724 P.2d 80 (Colo. App. 1986).

Colorado courts have applied various standards in rebutting presumptions. *See e.g., The Denver Publishing Co., supra* (sufficient but not substantial evidence); *City and County of Denver v. DeLong*, 545 P.2d 154 (Colo. 1976) (direct and credible evidence); *Cline v. City of Boulder*, 532 P.2d 770 (Colo. App. 1975) (substantial, competent evidence); *Schenck, supra* (strong and credible evidence); *Martin v. Johnson*, 708 P.2d 121 (Colo.

1985)(clear and convincing evidence).

It has been ruled that the presumption of receipt of a mailed notice is not overcome by the mere denial of receipt in a pleading. *Johnson-Voiland-Archuleta, Inc. v. Roark & Associates*, 608 P.2d 818 (Colo. App. 1979). It has also been ruled that the presumption of the receipt of a mailed notice is not overcome by testimony of a denial at trial. *Olsen v. Davidson et al.*, 350 P.2d 338 (Colo. 1960). However, the court found that the denial of receipt overcame the presumption in *City and County of Denver v. East Jefferson County Sanitation District*, 771 P.2d 16 (Colo. App. 1988).

When evidence of whether a letter was actually mailed is conflicting, the presumption does not arise and the conflict must be resolved by the trier of fact. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

In this administrative proceeding, the preponderance of the evidence standard (more likely than not) is used in measuring the amount of evidence necessary to overcome a rebuttable presumption.

The presumption at issue is that there was a proper delegation of appointing authority by respondent. In the absence of evidence, the presumption says that the delegation was proper. Following the direct and cross-examination of respondent's witnesses at the first hearing, however, the evidence demonstrated that the delegation of appointing authority from West to McKenna was improper. At that point, the presumption no longer attached. It ceased to exist. Otherwise, the fact finder is being asked to disregard the evidence. In a sense, it may be said that the respondent, itself, rebutted the presumption.

The purpose of a presumption is to allow the fact finder to assume that a fact is true until either the presumption is rebutted, in which event the fact must be proven, or the evidence shows that the fact is not true. To require the complainant to go forward with evidence to rebut a presumption, after it has been shown that the presumed fact is not true, defeats the purpose of a presumption, which is to take as true a purported fact of which there has been no evidence.

At the hearing on remand, complainant introduced persuasive evidence that Gasko was not provided a copy of the letter delegating authority from West to McKenna as required. For if it is accurate to presume that, because she had worked in her position for two years, the administrative assistant sent a copy of the subject memo to Gasko, then it is also correct to presume that she followed the normal practice of putting Gasko's name on the face of the document, which indisputably was not done. No reason or explanation was advanced to suggest that Gasko received a "blind" copy. Thus, complainant rebutted the presumption of regularity, if one attached, by showing that the procedure followed by respondent was *irregular*. It was then incumbent on respondent to come forward with evidence to show that, in spite of the irregular procedure, Gasko was, in fact, copied.

In addition to Gasko not being copied on West's letter of delegation to McKenna, Gasko's writing, and consequently Rule R1-4-2(B), was violated in another respect. Specifically, McKenna's request for further delegation was not approved by Gasko. Rather, Gasko agreed with West almost two weeks before the request that McKenna was the appropriate choice. Gasko's written instruction that all future requests for further delegation be approved by him

plainly and analytically refers not to West's request to him, but instead to any requests of West from others. The request must be approved by Gasko when it is made, enabling Gasko to make a determination under the circumstances as they exist at that time. General agreement a week or two prior to a request actually being made does not constitute an approval of the specific request. Approval is the act of confirming or sanctioning some act done by another, after knowledge of the act. *Black's Law Dictionary* (6th ed.) at 102. The term "approve" is to be distinguished from "authorize," which means to permit a thing to be done in the future. *Id.*

These are significant violations of Gasko's writing and of Rule R1-4-2. If they are ignored, then the rule is not being enforced and respondent may unilaterally define the rule's parameters.

II.

The Board's order requires the ALJ to consider the issues listed in the initial decision of July 30, 1997, "in light of any newly introduced evidence regarding the delegation of appointing authority." Since the evidence on remand was limited to the delegation issue, I will address issues 1 and 2 in view of the whole record and reach conclusions of law. Conclusions 3, 4, 5 and 6 remain the same. The order does not change.

After a considered review of the entire record, it is found that respondent failed to prove by preponderant evidence that complainant was responsible for the attack on inmate Cisneros, which is necessary to sustain this termination. Respondent established that complainant said "Go ask Cisneros," and that the inmate was assaulted and injured, but the evidence is insufficient

for the purpose of concluding that complainant caused (or "may have. . . precipitated") the incident. It has not been persuasively shown that complainant's words resulted in one inmate attacking another. Although a corrective action with respect to his comment, or possibly another type of penalty, may have been appropriate, the ultimate sanction of dismissal upon a finding of the appointing authority that the assault "may have been precipitated" by complainant was not justified or warranted.

Under these circumstances, the termination action was arbitrary and capricious. Dismissal was not within the realm of alternatives available to the appointing authority.

CONCLUSIONS OF LAW

1. Respondent did not prove that complainant committed the acts for which discipline was imposed.

2. The discipline imposed was not within the range of alternatives available to the appointing authority.

3. See Initial Decision of July 30, 1997.

4. See above.

5. See above.

6. See above.

ORDER

See Initial Decision of July 30, 1997.

DATED this _____ day of April, 1998, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of April, 1998, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE ON REMAND FROM THE STATE PERSONNEL BOARD** in the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf
Attorney at Law
1390 Logan Street, Suite 402
Denver, CO 80203

and in the interagency mail, addressed as follows:

Diane Marie Michaud
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

_____